No. 77-1063

In the Supreme Court of the United States

OCTOBER TERM, 1977

SIDNEY M. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1063

SIDNEY M. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for filing false income tax returns on the ground that there was no evidence of willfulness, that he was subject to selective prosecution, and that one of the counts was barred by the statute of limitations.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was found guilty of filing false income tax returns for the years 1968-1970, in violation of 26 U.S.C. 7206(1). The district court imposed no prison sentence; it fined petitioner a total of $7,000 with respect to the three counts (Tr. 1146, 1163).[1] The court of appeals affirmed (Pet. App. 501-505).

---

[1]"Tr." refers to the trial transcript. "Op." citations refer to the trial court's opinion of December 10, 1976, denying petitioner's post-trial motions.

It was undisputed that the petitioner had signed his individual income tax returns for the years in question and that the returns had omitted substantial amounts of "adjusted gross income."[2] The district court found that petitioner's returns greatly overstated certain deductions (Tr. 1141-1144) and omitted substantial capital gains from 1968 and 1969 as the result of manipulations of corporate stock transactions (Tr. 1140-1141, 1143). The court also found that petitioner had paid some of his ductible expenses with backdated checks and claimed the deductions in advance of the year of payment[3] (Op. 10, 13), and had improperly deducted interest on two loans prior to the taxable year in which the loans were established (Tr. 1142). The trial court found that the evidence established that petitioner exercised extensive control over his financial transactions (Tr. 1142-1143) and thereby refuted petitioner's claim that his bookkeepers and accountants were responsible for the false returns. Accordingly, the trial court concluded that petitioner's understatements of income "* * * had too strong a relationship to the tax computation period and computation of taxes themselves" (Pet. App. 503; Tr. 1140) to have been isolated mistakes.

1. Petitioner contends (Pet. 69-103, 116-145) that the evidence was insufficient to establish that he acted willfully. But the court of appeals (see Pet. App. 503) correctly viewed the evidence in the light most favorable to the government and concluded that the evidence and the reasonable inferences therefrom supported the verdict.

---

[2]The government's computations showed total unreported adjusted gross income of $66,605.63 in 1968, $15,075.84 in 1969 and $75,808.11 in 1970 (Tr. 991).

[3]The trial court found that petitioner's improperly accelerated deductions were used to reduce large capital gains in 1970 (Tr. 1144).

Glasser v. *United States*, 315 U.S. 60, 80. Contrary to petitioner's assertion (Pet. 86), willfulness may be inferred from the circumstances of the case. See, *e.g.*, *United States* v. *DiVarco*, 484 F. 2d 670, 674 (C.A. 7), certiorari denied, 415 U.S. 916; *United States* v. *Ramsdell*, 450 F. 2d 130, 134 (C.A. 10); *United States* v. *Spinelli*, 443 F. 2d 2, 3 (C.A. 9). Here, the trial court properly considered evidence which established a consistent three-year pattern of substantial underreporting of adjusted gross income (*Holland* v. *United States*, 348 U.S. 121, 139) and manipulative conduct by petitioner, such as the backdating of checks[4] (see *Spies* v. *United States*, 317 U.S. 492, 499). Moreover, the trial court properly considered his intent in light of his background as an attorney and a man of admittedly extensive business experience. See *United States* v. *Coblentz*, 453 F. 2d 503, 505 (C.A. 2), certiorari denied, 406 U.S. 917; *United States* v. *Ostendorff*, 371 F. 2d 729, 731 (C.A. 4), certiorari denied, 386 U.S. 982. Viewing the "whole picture" (Tr. 1144) of the evidence, the trial court could reasonably conclude that although petitioner did not prepare the returns which he had signed and filed "* * * he "knew that he should have reported more income than he did." *Sansone* v. *United States*, 380 U.S. 343, 353.

2. Petitioner further argues (Pet. 8-37, 59-69) that he was the victim of selective prosecution. Although he asserts that the government, the trial court, the newspapers in Milwaukee, Wisconsin, and an alleged "unknown power" (Pet. 15) had entered a conspiracy to "get" him, petitioner failed to produce any evidence to

---

[4]Petitioner attributes many of the errors in his returns to the hybrid method of accounting he used. But the trial court found that the system was not uniformly used or applied and was in fact misused by the petitioner for tax computation purposes (Tr. 1139-1140; Op. 10).

support his contention. Accordingly, the court of appeals correctly held (Pet. App. 504-505) that petitioner had failed to demonstrate that others similarly situated had not been prosecuted for the same crimes and that the government had employed an impermissible standard in deciding to prosecute him. See, *e.g.*, *United States* v. *Kelly*, 556 F. 2d 257, 264 (C.A. 5); *United States* v. *Bourque*, 541 F. 2d 290, 292-293 (C.A. 1); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, 424 U.S. 955; *United States* v. *Peskin*, 527 F. 2d 71, 86 (C.A. 7), certiorari denied, 429 U.S. 818.

3. Finally, petitioner argues (Pet. 103-106) that the charge for 1968 was barred by the statute of limitations. Petitioner was originally indicted on April 9, 1975, prior to the expiration of the six-year statute of limitations (26 U.S.C. 6531(5)) for Count I of the indictment. That indictment charged petitioner with falsely reporting "gross income" on his returns. At the request of the government, the trial court dismissed the indictment as "technically defective" on August 22, 1975. The present substituted indictment was returned on September 5, 1975, charging the same violations for the same years, but substituting the term "adjusted gross income" in all counts where the phrase "gross income" had appeared in the original indictment. Thus, the court of appeals correctly held (Pet. App. 503-504) that under the saving provision of 18 U.S.C. 3288, Count I was not barred by the statute of limitations, because petitioner was reindicted within six months of dismissal of the original timely indictment. See, *e.g.*, *United States* v. *Charnay*, 537 F. 2d 341, 354-355 (C.A. 9), certiorari denied, 429 U.S. 1000; *Mende* v. *United States*, 282 F. 2d 881, 883-884 (C.A. 9).

Petitioner contends, however, that Section 3288 does not extend the statute of limitations in this case, because the original indictment was not "legally insufficient" (Pet. 58). But his contention ignores the plain language of 18 U.S.C. 3288, which extends the statute of limitations when an indictment is found "* * * defective or insufficient for any cause."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.